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In The

Supreme Court of the United States

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, AND EMMITT TURNER, CHIEF OF POLICE OF THE METROPOLITAN POLICE DEPARTMENT,

Petitioners,

v.

DEJA VU OF NASHVILLE, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Sixth Circuit Court of Appeals found that Chapter 6.54 of the Metropolitan Code of Nashville and Davidson County lacks the required prompt judicial review by failing to guarantee access to state courts. The question of whether the prompt judicial review component requires prompt judicial access or prompt judicial determination played little if any role in the court's decision. Because the only available "appellate" remedy available in the State of Tennessee is the discretionary common law writ of certiorari, the ordinance fails under even the less restrictive access definition of the prompt judicial review requirement. As such, this case presents the question of whether a discretionary review procedure satisfies the prompt judicial review requirement, without regard to whether that requirement mandates prompt determination or merely prompt access to the courts.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Deja Vu of Nashville, Inc., Michael Rucker, Michael Butler, Meroney Entertainment, Inc., the Pleasure Palace, Inc., Dawn Pierce, Elizabeth Martz, the 822 Corporation and 421 Corporation (collectively "Respondents"), respectfully request that this Court deny the Petition for a Writ of Certiorari filed by the Metropolitan Government of Nashville and Davidson County and Emmett Turner to review the judgment of the United States Court of Appeals for the Sixth Circuit rendered in this case.

ADDITIONAL RELEVANT STATUTORY PROVISIONS

In addition to the constitutional, statutory, and ordinance provisions reproduced in the appendix to the Petition, Respondents submit here the Tennessee common law writ of certiorari statute found at Tenn. Code Ann. §27-8-101 (Opp. App. 1a),[1] the Tennessee statutory writ of certiorari provision appearing at Tenn. Code Ann. §27-8-102 (Opp. App. 1a), Tenn. Code Ann. §57-4-204 (Opp. App. 19a-22a), and Metropolitan Code Section 7.24.030 (Opp. App. 22a-25a).

[1] As used herein, "Pet. App. xxx" refers to pages of the appendix accompanying the Petition, and "Opp. App. xxx" refers to pages of the appendix attached hereto.

STATEMENT IN OPPOSITION

If this Court is searching for a case to resolve the question of whether the "prompt judicial review" component of *Freedman v. Maryland*, 380 U.S. 51 (1965) requires a prompt judicial determination on the merits or merely "prompt judicial access," this is not it.

The Ordinance at issue here guarantees neither a prompt judicial determination of the propriety of the government's actions nor prompt access to a judicial forum. Adverse decisions of the sexually oriented business licensing board ("Board") made pursuant to Chapter 6.54 are reviewable only upon the issuance of a common law writ of certiorari. This procedure is inherently flawed in at least three respects. First, because the issuance of the writ is discretionary in nature, aggrieved applicants and license holders are not guaranteed access to a judicial forum. Second, even if the writ is ultimately accepted and judicial access is granted, the court is not required to issue a decision as to whether to review a particular case within a specific and reasonable period of time. The court could conceivably delay ruling upon a petition for writ of certiorari indefinitely, during which time the applicant's First Amendment rights are continually violated. Third, even if a writ of certiorari is promptly issued, the court is precluded from providing adequate judicial review because it cannot review the intrinsic correctness of a decision.

Given these flaws, the judicial review provisions contained in Chapter 6.54 do not constitute an adequate and appropriate mechanism of prompt judicial review, regardless of how the words "prompt" and "review" are

defined. This was, indeed, the focus of the Sixth Circuit's ruling and not the question of whether prompt judicial review requires prompt determination or mere access. Therefore, not only does this case constitute an inadequate vehicle to resolve any conflict amongst the circuits, but that dispute may well never be reached by this Court should it elect to review the Sixth Circuit's decision.

In addition, Petitioner overstates the disparity between circuit rulings addressing the construction of the phrase "prompt judicial review." A number of the decisions that Petitioner relies on to establish a conflict actually involved content-neutral time, place, and manner restrictions similar to those at issue in *Thomas v. Chicago Park District*, 122 S.Ct. 775 (2002). Because such restrictions are not required to contain the *Freedman* procedural guarantees generally necessary for targeted adult business regulations to pass constitutional muster, *Thomas*, 122 S.Ct. at 780, n.2, there is no circuit conflict between those decisions and the ruling of the Sixth Circuit here.

REASONS THAT THE PETITION SHOULD BE DENIED

I. THE DECISION OF THE SIXTH CIRCUIT WAS PREDICATED UPON THE FACT THAT THE "JUDICIAL REVIEW" AFFORDED BY CHAPTER 6.54 AND TENNESSEE LAW IS DISCRETIONARY IN NATURE.

Petitioner appropriately acknowledges here, as it has throughout the entirety of these legal proceedings, that the potentially available "judicial review" of an adverse

administrative decision by the Board is by way of a "common law writ of certiorari from a state trial court." Petition, p. 4, *citing*, Ord. §§.040(E)(2),[2] .070(D)(2), .110(M), and .150(E)(6). *See also, Deja Vu of Nashville, Inc. v. Metropolitan Gov't of Nashville and Davidson Cty., Tenn.*, 274 F.3d 377, 401 n.6 (6th Cir. 2001) (Metro acknowledging at oral argument in the Sixth Circuit that the provisions of Chapter 6.54 only authorize review "via the common law writ"). Petitioner admits that the Metropolitan code does not "guarantee that the appeal will be decided by a date certain." Petition, p. 2. In fact, Chapter 6.54 and the overlying Tennessee statute of common law certiorari does not even guarantee that any form of judicial review will be provided *at all*.

The Tennessee "common law" writ of certiorari is found in Tenn. Code Ann. 27-8-101. Opp. App. 1a. Pursuant to that statute, a court has the absolute discretion to deny a petition for issuance of the writ, and never then reach the merits of the issues sought to be reviewed.

"[W]hether the common law writ of certiorari will issue is a matter of discretion. It is not issued as a matter of right." *Boyce v. Williams*, 389 S.W.2d 272, 277 (Tenn. 1965). *See also, Clark v. Metropolitan Gov't of Nashville*, 827 S.W.2d 312, 316-17 (Tenn. App. 1991) ("the remedy of certiorari is not available as of right, but is granted under *unusual or extraordinary circumstances*. It is instituted by an application to a court of competent jurisdiction which

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[2] The designation of "Ord. §.xxx" specifies particular provisions of Chapter 6.54. The sections and subsections referred to are found in the version of that Ordinance which are reproduced at Pet. App. 130a-176a.

may *or may not* authorize the writ") (emphasis added). And, the Petitioner acknowledges this discretionary nature of the common law writ. *See*, Petition, p. 4 ("*If* the trial court grants the writ, and thus determines to consider the appeal . . . ") (emphasis added).

In addition, not only is granting of the writ discretionary, but there is no time limit for a court to decide upon whether to grant the petition or not, and then review the merits of the dispute. Tenn. Code Ann. §27-9-111(e) (Pet. App. 129a).[3] Accordingly, Chapter 6.54, together with the common law writ, does not even provide prompt *access* to a judicial forum. It is *this aspect* of Chapter 6.54 and Tennessee law which served as the lynchpin of the Sixth Circuit ruling, and not any determination as to whether "prompt judicial review" necessitated a prompt judicial determination or merely mandated prompt access to a court. *Deja Vu of Nashville*, 274 F.3d at 401-02 (the appellate court referring to the discretionary nature of the common law writ as the "*biggest problem* with the Ordinance's judicial review provision") (emphasis added).

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[3] Petitioner states that the Metropolitan Government "has no power to require a state court to grant a writ of certiorari or to act on an appeal by any particular date." Petition, p. 4. While technically true, that statement is not, as they say, accurate. After the District Court issued its first preliminary injunction enjoining Chapter 6.54 for failing to comply with the *Freedman* procedural guarantees, Metro successfully lobbied for the Tennessee Legislature to enact what is the current version of Tenn. Code Ann. §27-9-111(e). That statute does, of course, compel a court "to act on an appeal by . . . [a] particular date." Pet. App. 129a.

II. THE SCOPE OF REVIEW UNDER THE TENNESSEE COMMON LAW WRIT OF CERTIORARI IS FAR TOO NARROW TO AFFORD ADEQUATE PROTECTIONS TO FIRST AMENDMENT PROTECTED ACTIVITIES.

Simply put, the Tennessee common law writ of certiorari is not *appellate* review at all. *See, Helton v. State*, 250 S.W.2d 540, 541 (Tenn. 1952), *quoting, State ex rel. McMurrow v. Hunt*, 192 S.W. 931, 933 (Tenn. 1917) (the supervisory powers of Tennessee Courts to issue a common law writ of certiorari "should not be confounded with its appellate jurisdiction").

> *The writ has never been employed to inquire into the correctness of the judgment rendered where the court had jurisdiction, and was therefore competent.* Hence, it has been held that the supervisory jurisdiction of the court on a certiorari must be restricted to an examination into the *external validity* of the proceedings had in the lower court. *It cannot be exercised to review the judgment as to its intrinsic correctness, either on the law or on the facts of the case.*

Helton, 250 S.W.2d at 540-41 (emphasis added).

Accordingly, "[t]he scope of review under the common law writ . . . is *very narrow*. It covers only an inquiry into whether the board has exceeded its jurisdiction or is acting illegally, fraudulently, or arbitrarily. . . . " *Powell v. Parole Eligibility Review Board*, 879 S.W.2d 871, 873 (Tenn. App. 1994), *appeal denied* (June 20, 1994) (emphasis added). "At the risk of oversimplification, one may say that it is not the correctness of the decision that is subject to judicial review, but the *manner* in which the decision is

reached. If the agency or board has reached its decision in a constitutional or lawful manner, then the decision would *not* be subject to judicial review." *Id.* (emphasis added).[4]

This limited inquiry under Tennessee law is not the form of appellate review that this Court has mandated in order to insure that First Amendment rights are not trampled upon by an overzealous government. *Cf., FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 228 (1980) (The First Amendment requires that there be "prompt judicial review in the event that the license is *erroneously denied*") (emphasis added). And, the actions of the Board here well illustrate that the Tennessee common law writ of certiorari is not the type of "sensitive tool" necessary to protect First Amendment rights from governmental infringement, regardless of *when* that judicial review may ultimately be provided.

After the District Court lifted the first preliminary injunction (concluding that Metro had "fixed" the *Freedman* procedural issues), the adult businesses in Nashville and Davidson County were then required to undergo the licensing process of Chapter 6.54. Of the *eighteen* businesses that filed applications, only *three* were initially granted licenses by the Board. Deja Vu's application was

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[4] *Accord, Yokley v. State,* 632 S.W.2d 123, 125 (Tenn. App. 1981), *cert. denied,* November 30, 1981 (an erroneous decision is not an illegal decision, and a court may not substitute its decision for that of an inferior board "regardless of how erroneous the decision of the Board may have been"); and *Henry v. Board of Claims,* 638 S.W.2d 825, 827 (Tenn. App. 1982) (*appeal denied* September 7, 1982) ("an erroneous decision of the Board, absent more, is not an illegal, arbitrary, or fraudulent decision").

denied based upon a conclusion by the Board that the establishment needed to clean a number of couches, restroom walls, fixtures and shower stalls; repair a commode; and provide covered waste containers. Opp. App. 11a-13a. The Board also concluded that the application should be denied because an inspector had asserted that entertainers were in violation of a three-foot dancer/patron buffer zone restriction[5] as contained in Chapter 6.54. *Id.*

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[5] Petitioner is therefore incorrect when it asserts that initial "decisions regarding the issuance, renewal, and revocation of licenses are made at the administrative level by the Metropolitan Government based on criteria *unrelated to the content of any speech.*" Petition, p. 3 (emphasis added), *citing*, Ord. §§.040(C)(2), .110(K), .150(A)(1)-(10). Also illustrating the erroneous nature of this statement is the fact that a license application can be denied, and an issued license suspended or revoked, predicated specifically upon the content of expression, such as violations of obscenity, indecent exposure and public nudity laws, or even the "performance standards" of Chapter 6.54 itself (Ord. §.140). *See, e.g.*, Ord. §§.050(B)(3) and (4), .080(A)(2) and (4), .150(A)(9) and (10) (the provisions of Tenn. Code Ann. §57-4-204 described in subsection 10 is found at Opp. App. 19a-22a, and "Metropolitan Code section 7.24.030" is reproduced in Opp. App. 22a-25a, with §.030(C) clearly illustrating that revocation and/or suspension of a license can be specifically predicated upon the "*content*" of expression), and .150(B)(1). In addition, there will certainly be instances where the Metropolitan Government asserts that a business is subject to Chapter 6.54, although the owners and operators of the establishment contend to the contrary. In that circumstance, the Board will clearly be required to evaluate the *content* of the expression in order to determine whether the business presents one or more of the types of entertainment which are defined to be required to comply with the Ordinance. *See, e.g.*, Ord. §§.010(Y)(1), (2), (3), and (4), (Z), (AA) and (BB).

Other establishments suffered similar fates. A business known as the "Pleasure Palace" had its application denied due to the alleged need to repair a hand sink, clean some walls, air conditioning vents and storage areas, and to provide for hand towels (Opp. App. 13a-15a); Club Platinum's application was denied because it allegedly needed to repair a toilet, clean showers, and "eliminate storage that may attract rodents and insects" (Opp. App. 16a-17a); and the Executive Club had its application denied because the Board felt that it needed to repair a couch, clean the restroom floors, and provide covered trash cans (Opp. App. 17a-18a).

Implicating no constitutional or procedural issues whatsoever, if the applicants desired to seek to have a court overturn these decisions, they would strictly have to attack the *intrinsic correctness* of the administrative rulings;[6] an aspect of review that is specifically *precluded*

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[6] A similar example of this problem would be presented in the circumstance where the Board, in invoking one of the "civil disability" provisions of the Ordinance, decided to deny an application for a license based upon an alleged criminal conviction or Ordinance violation of the applicant. *See, e.g.*, Ord. §.050(B)(2). If the applicant, however, contended that the Board had simply "gotten the wrong guy," and that he in fact had not been convicted of a disabling crime, that person would be precluded under the Tennessee common law writ from seeking judicial redress in an effort to correct that erroneous decision. And, the Petitioner is incorrect when it contends that a writ of certiorari must be issued "when an administrative ruling prohibits speech activities." Petition, p. 10 n.8. An erroneous ruling does not a constitutional violation make. *See, e.g., Powell*, 879 S.W.2d at 873 (error in calculating a prisoner release eligibility date, which therefore arguably led to a violation of

under the Tennessee common law writ of certiorari.[7] These factually driven license application denials would simply then be *immune* from review under the common law writ.

Therefore, regardless of any consideration of the *timing* of judicial review, the mere limited scope of the Tennessee common law writ establishes that it fails to comply with this Court's rulings in regard to the mandatory nature of available judicial review. In fact, this Court

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the petitioner's equal protection and due process rights under the Constitution, was *not* reviewable by a common law writ).

[7] The limited nature of review of the common law writ should be contrasted with the broader *appellate* review as provided by the *statutory* writ of certiorari found in Tenn. Code Ann. §27-8-102 (Opp. App. 1a). Unlike the common law writ, the statutory writ *is* "a substitute for appeal." Tenn. Code Ann. §27-8-102(3). More importantly, while the common law writ is discretionary, *see* discussion, *supra*, and Tenn. Code Ann. §27-8-101 ("the writ of certiorari *may* be granted . . . "), the statutory writ contains no such limitation ("certiorari *lies* . . . as a substitute for appeal"). As one commentator summed it up, "in order to obtain a broader scope of review, the statutory writ of certiorari must be utilized," and that "the statutory writ of certiorari provides a de novo review of both law and facts; therefore, *it is the favored procedure.*" Mark Guthrie, *Methods of Judicial Review Over Administrative Actions in Tennessee*, 13 Memphis St. Univ. L.Rev. 657, 666 (1983) (emphasis added). *See also, Enochs v. Narren*, 949 S.W.2d 686, 688 (Tenn. App. 1996), *appeal denied* (May 27, 1997) (statutory writ of certiorari involved some type of trial de novo). The Metropolitan Government could easily have provided for review by the statutory as opposed to the common law writ, but not having done so, this challenged ordinance is certainly then constitutionally infirm regardless of whether the "judicial review" that it provides for is "prompt."

reviewed the Tennessee system of appeals from administrative decisions in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), and concluded that the procedures were unconstitutional because state courts did not timely "review the *merits* of the decision." *Id.* at 561-62 (emphasis added).

III. THE PETITIONER'S ABANDONMENT OF A FUNDAMENTAL TENANT OF ITS ARGUMENT BELOW DOES NOT SERVE TO OBVIATE THE REALITY THAT CHAPTER 6.54 FAILS TO GUARANTEE JUDICIAL REVIEW OF AN ADVERSE ADMINISTRATIVE RULING, IRRESPECTIVE OF WHETHER SUCH RELIEF IS AFFORDED PROMPTLY OR NOT.

Perhaps recognizing the fact that the majority of petitions by aggrieved applicants will be denied by courts because they do not raise questions of whether the administrative board exceeded its jurisdiction or acted illegally, fraudulently, or arbitrarily, the Petitioner abandons in this Court a position that it has consistently maintained over the past four plus years of litigation. Specifically, Petitioner now contends for the first time that if a trial court declines to grant the petition for a writ of certiorari, the "adult business prevails as a matter of right." Petition, p. 10. And, Petitioner acknowledges it is now taking a position inconsistent with its arguments below. Petition, p. 6 n.6.

This revised "position" should be contrasted with the claim that the Petitioner first raised as far back as 1998, when in a hearing before the District Court, counsel for the Petitioner succinctly stated:

> Let me go back to the Court's first question, what would happen if the writ of cert. was denied. *Case law is clear in Tennessee, a denial of a writ of cert. is a decision on the merits . . .* [and] *the stay would be lifted. . . .*

Opp. App. 7a-8a. (emphasis and clarification added).

Petitioner's "change of heart" is unavailing for numerous reasons.

First, the position that the Petitioner *now* takes does not alleviate the constitutional infirmity for numerous businesses and individuals affected by Chapter 6.54. Petitioner changes direction on this long-held position in an effort to emphasize to this Court the provisions of Ord. §§.040(E)(3) (Pet. App. 148a) and .070(D)(3) (Pet. App. 159a), which hold that for what are defined to be "existing" adult businesses and "current" entertainers,[8] any adverse administrative decision that is appealed to any court "shall not take effect until the decision has been upheld by the Court *after adjudication on the merits.*"

Yet, and inexplicably, for "new" businesses and entertainers (those not in operation or performing in the Metropolitan area as of March 1, 1999 (Ord. §.010(L) and (M) (Pet. App. 132a)), there is no such "protection." Rather, for them, an adverse administrative decision "shall take effect the day the decision is issued by the Board." Ord. §§.040(E)(4) (Pet. App. 148a), and .070(D)(4) (Pet. App. 159a).

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[8] These "existing" businesses and "current" entertainers are those that were operating/performing in the Metropolitan area as of March 1, 1999. Ord. §.010(D) and (G) (Pet. App. 131a).

Respondents challenged the constitutionality of Chapter 6.54 not only as applied, but facially as well (*see*, Complaint excerpts, Opp. App. 2a-6a, and *Deja Vu of Nashville*, 274 F.3d at 398-99).[9] Consequently, particularly in light of the fact that literally hundreds of entertainers have come and gone from the Respondents' businesses since March 1, 1999, the concentration by the Petitioner upon this purported "saving language" rings hollow in that it is simply *not applicable* to the circumstance of those entertainers who commenced performing in the Metropolitan area after March 1, 1999, let alone to the new adult entertainment establishments which have opened up for business after that date.

Second, the new "position" of the Petitioner makes little logical or practical sense. Petitioner now contends that the "ordinance provides that the administrative ruling is void unless considered by the court on appeal and sustained." Petition, p. 4. *See also*, Petition, p. 7 (" . . . if the trial court did not grant the writ of certiorari and decide the appeal 'on the merits,' respondents would *automatically prevail*") (emphasis in original).[10] Yet, under

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[9] Given this facial challenge, Respondents certainly had standing to raise the constitutional concerns of these "new" entertainers. *See, e.g., Connection Distributing Co. v. Reno*, 154 F.3d 281, 295 (6th Cir. 1998) (magazine had ability to assert rights of readers); and *Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1252-53 (5th Cir. 1995) (exotic dance club had standing to assert constitutional claims of entertainers who performed at the establishment).

[10] Again, these arguments of the Petitioner truly apply, if at all, only in the circumstance of *existing* businesses and *current* entertainers. As spurious as they may be, these assertions have absolutely no application to *new* businesses or entertainers.

the Petitioner's "logic," an aggrieved applicant or license holder could prevail in regard to any adverse administrative ruling by the Board simply by filing a petition for a common law writ, making no arguments of merit, and then "winning" their case when the court denies the petition!

Third, and illustrative of the questionable logic of the Petitioner's "new and improved" approach, the fact remains that for four plus years, Metro has taken the unwaivering position with the District Court and with the Circuit Court of Appeals that under Tennessee law, a denial of a petition for a writ of certiorari *was* a "decision on the merits." In addition, certainly in regard to *"new"* entertainers and businesses, a denial of a petition for a common law writ means that an aggrieved applicant or license holder will have received *absolutely no judicial review at all to an adverse administrative ruling by the Board.*[11]

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[11] Petitioner asserts that "there is no dispute that the writ would be denied, if ever, only in the most extraordinary circumstances." Petition, p. 10 n.8. That is far from an accurate characterization of the law in Tennessee and the proceedings below. First, the Affidavit of Claudia Bonnyman submitted by the Petitioner in the District Court (Opp. App. 9a-10a) falls far short of asserting that *all* petitions for a common law writ of certiorari are granted. *See, Deja Vu of Nashville*, 274 F.3d at 402. Second, the non-constitutional and non-procedural factual matters that would be at issue in many of the requests for judicial review could only be rectified by seeking redress in regard to the *intrinsic correctness* of the administrative ruling, which is *not* an appropriate function of the common law writ. Accordingly, most of those petitioners would be denied as a matter of due course. And, there is no shortage of Tennessee cases illustrating courts denying writs based upon just that fact.

Fourth, while the Petitioner attempts to dismiss this significant change of position as merely agreeing with a "construction of state law," Petition, p. 6 n.6, that is not the case. Not only did the District and Circuit Courts not "construe" the ordinance in the fashion as suggested by the Petitioner, but, more to the point, those federal courts are not even empowered to provide such a limiting construction of state law. *Virginia v. American Booksellers Assn.*, 484 U.S. 383, 397 (1988) ("we will not rewrite a state law to conform it to constitutional requirements"); and *Freedman*, 380 U.S. at 369 (federal courts lack jurisdiction to authoritatively construe state legislation).

IV. CERTIORARI SHOULD BE DENIED BECAUSE THE SIXTH CIRCUIT RULED CORRECTLY IN THIS ACTION.

Irrespective of any perceived "split" in the circuits, and irrespective of the other constitutional infirmities of Chapter 6.54 as referenced, *supra*, Petitioner simply fails to present any persuasive argument that the Sixth Circuit

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See, e.g., Fite v. State Board of Paroles, 925 S.W.2d 543 (Tenn. App. 1996) (*appeal denied* May 28, 1996) ("petition does not state any facts that would support a claim that the Board acted illegally, fraudulently, or arbitrarily, or that it exceeded its authority," and therefore petitioner "is not entitled to a Writ of Certiorari"). Third, the Petitioner itself clearly acknowledges that the courts have the authority and discretion to deny a petition for a common law writ. *See, e.g.*, Petition, p. 4. Finally, the Petitioner actually has it backwards, in that a common law writ of certiorari is to be *granted* only under "unusual or extraordinary circumstances." *Clark*, 827 S.W.2d at 316-17.

was incorrect in its ruling that *Freedman* requires a prompt judicial determination. This Court has never held that mere judicial access affords appropriate First Amendment protections, and since the time of the decision in *Freedman*, the rulings of this Court have repeatedly used language affirming that a prompt final judicial resolution is required.

In *Freedman* itself, in defining "prompt judicial review," this Court used the phrases "final judicial determination on the merits," and "judicial resolution." *Freedman*, 380 U.S. at 59. In *Blount v. Rizzi*, 400 U.S. 410, 417 (1971), reference is made to a requirement for a "final judicial determination on the merits within a specified, brief period." Similarly, in *Southeastern Promotion, Ltd. v. Conrad*, 420 U.S. 546, 560 (1975), which coincidentally also dealt with the writ system in the State of Tennessee, this Court found the existing state procedures lacking and once again articulated that *Freedman* required a "prompt final judicial determination." *See, also, Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 161 n.3 (1969) (Harlan, J., concurring) ("although Shuttlesworth could have petitioned for a writ of mandamus in the Alabama Circuit Court if the City Commission denied his application, that state court is not obligated to render a decision within any fixed period of time"); and *FW/PBS*, 493 U.S. at 228 (the plurality of the Court noting that in a licensing scheme involving "adult" businesses, "*the first two [Freedman] safeguards are essential*") (emphasis and clarification added).

V. THE CONFLICT AMONGST THE CIRCUITS IDENTIFIED BY PETITIONER IS NOT AS FRACTIOUS AS PETITIONER ASSERTS.

Petitioner argues that this Court should grant the petition because the circuits are in conflict on the question of whether this Court's decisions in *Freedman* and *FW/PBS, Inc. v. Dallas*, 493 U.S. 215 (1990), require merely prompt judicial access or a prompt judicial decision. Petition, p. 8. Yet, upon closer examination, this conflict is not as apparent and troublesome as it may appear at first blush.

To date, three circuits have explicitly held that in the context of adult business licensing schemes, a prompt judicial determination on the merits is required to satisfy the *Freedman* prompt judicial review requirement. *See, Nightclubs, Inc. v. Paducah*, 202 F.3d 884, 892-93 (6th Cir. 2000); *Baby Tam & Co. v. Las Vegas*, 154 F.3d 1097, 1101 (9th Cir. 1998); and *11126 Baltimore Blvd., Inc. v. Prince George's Cty.*, 58 F.3d 988, 998-1001 (4th Cir. 1995) (*en banc*). While the First and Seventh Circuits are claimed to be in conflict with these decisions (Petition, p. 9), that is not the case. In both *Jews for Jesus, Inc. v. Massachusetts Bay Transportation Authority*, 984 F.2d 1319 (1st Cir. 1993), and *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993), the appellate courts evaluated time, place, and manner restrictions on public fora closely akin to the regulation at issue in *Thomas v. Chicago Park District*, 122 S.Ct. 775 (2002). In *Thomas*, this Court determined that time, place, and manner restrictions of public fora need not comply with the *Freedman* procedural safeguards ordinarily required of prior restraints targeting sexually oriented expression. To the extent that the First and Seventh Circuits reached similar

conclusions, they are not in conflict with the majority construction of the prompt judicial review requirement. As such, this Court should not accept certiorari in this case because the alleged conflict amongst the circuits is not as pronounced as the Petitioner suggests.

CONCLUSION

Because the Sixth Circuit ruled correctly in this case, and because resolution of the prompt judicial determination/access question is not necessary to uphold the decision of the Sixth Circuit, Respondents respectfully request that the petition be denied.

Respectfully submitted,

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APPENDIX

Tennessee Code Annotated

27-8-101. Constitutional basis. – The writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy. [Code 1858, § 3123 (deriv. Const. 1834, art. 6, § 10); Shan., § 4853; Code 1932, § 8989; T.C.A. (orig. ed.), § 27-801.]

27-8-102. Cases in which writ lies. – Certiorari lies:

(1) On suggestion if diminution;

(2) Where no appeal is given;

(3) As a substitute for appeal;

(4) Instead of audita querela; or

(5) Instead of writ of error. [Code 1858, § 3124; Shan., § 4854; Code 1932, § 8990; T.C.A. (orig. ed.), § 27-802.]

[Page 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC. a Tennessee corporation; MICHAEL RUCKER, individually; MICHAEL BUTLER, individually; MERONEY ENTERTAINMENT, INC., d/b/a KEN'S GOLD CLUB, a Tennesse corporation, THE PLEASURE PALACE, INC., a Tennessee corporation; CAROUSEL AMUSEMENT CENTER, INC., a Tennessee corporation; DAWN PIERCE and ELIZEBETH MARTZ, individually,

Plaintiffs,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; EMMITT TURNER, Chief of Police of the Metro Police Department,

Defendants.

CIVIL ACTION NO. 3-97-1066

JUDGE NIXON

VERIFIED COMPLAINT FOR PRELIMINARY INJUNCTION, PERMANENT INJUNCTION, AND DECLARATORY JUDGMENT

---

1. This is a civil action whereby Plaintiffs pray for a preliminary and permanent injunction enjoining the

Defendants from enforcement of Chapter 6.54 of the Code of Ordinances of the Metropolitan Government of Nashville and Davidson County, Tennessee (hereinafter "Chapter 6.54" or the "Ordinance"), passed on third

[Page 2]

reading by its Metropolitan County Council on August 19, 1997, on the ground that this Ordinance is unconstitutional on its face and as applied, and in its threatened application to Plaintiffs in their activities described below. Further, Plaintiffs pray for a declaratory judgment to determine the constitutionality of said Ordinance on its face, as applied to Plaintiffs, and in its threatened application to them, and Plaintiffs also request attorney fees as a result of the injuries sustained to their fundamental constitutional rights.

* * *

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* * *

20. Chapter 6.54 is an extremely lengthy and complex licensing and permitting scheme containing numerous and various restrictions, regulations and prohibitions affecting the constitutionally protected conduct of the Plaintiffs, their agents, representatives and employees as well as those individuals from the consenting adult audience which seek to view the entertainment or to purchase, rent and/or view other expressive media provided by the Plaintiffs. Because of the length and complexity of the Ordinance, the Plaintiffs, for the sake of clarity, will state the general grounds upon which they rely that the Ordinance is unconstitutional and will then

specifically list the provisions which violate one or more of the Plaintiffs' constitutional rights.

21. Plaintiffs aver that the licensing scheme as a whole is unconstitutional on its face, or as applied, because of the lack of procedural safeguards. It violates due process and is overbroad.

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It further violates equal protection. In addition, individual provisions of the Ordinance are unconstitutional or unconstitutional as applied to the Plaintiffs.

* * *

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* * *

22. Plaintiffs aver that the following licensing provisions in the Ordinance are in violation of one or more of the constitutional rights of Plaintiffs as listed in the preceding paragraphs. Plaintiffs aver that these are examples of the unconstitutionality of the Ordinance in violation of said constitutional provisions and do not constitute all of the provisions which will be demonstrated as unconstitutional on their face, or as applied.

* * *

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* * *

(P) The provision for a permit is denial of the right to travel of any featured dancers from out of state who could not be engaged to entertain because of the lengthy permit procedure.

* * *

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* * *

WHEREFORE, PLAINTIFFS PRAY that the Court grant its relief as follows:

(A) A preliminary injunction enjoining the Defendants, their agents, servants and employees from enforcing the Ordinance as alleged herein.

(B) A declaration that the Ordinance is unconstitutional and violative of First, Fourth, Fifth and Fourteenth Amendment rights guaranteed to Plaintiffs by the United States Constitution and Article 1, Section 19, Article 1, Section 8, and Article 11, Section 8 of the Tennessee Constitution.

(C) A permanent injunction, permanently enjoining and restraining the Defendants, their agents, servants and employees from enforcing the Ordinance.

(D) For attorneys fees and costs of this action, pursuant to 42 U.S.C. 1988.

(E) For all such other, further and different relief, both general and special, as to which the Plaintiffs may be entitled in the premises and as justice and equity may require.

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ATTORNEYS FOR PLAINTIFFS

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC., et al.,	)	
Plaintiffs,	)	
vs.	)	Case No.: 3-97-1066
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.,	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS
November 5, 1998

BEFORE THE HONORABLE SENIOR JUDGE
JOHN T. NIXON,
DISTRICT JUDGE

APPEARANCES:

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For the Defendant:
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* * *

MR. CHARLES: Your Honor, my name is Jim Charles. I will just have a short response to that.

Let me go back to the Court's first question, what would happen if the writ of cert was denied. Case law is clear in Tennessee, a denial of a writ of cert is a decision on the merits; you then appeal to the Court of Appeals. You would have the right –

THE COURT: What happens to the stay?

MR. CHARLES: The stay would be lifted, Your Honor.

THE COURT: All right.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

DEJA VU OF NASHVILLE, INC., a Tennessee Corporation, *et al.*, Plaintiffs, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY TENNESSEE, and EMMETT TURNER, Chief of Police, in his official capacity Defendants.	Case No. 3:97-1066 Judge Nixon Magistrate Griffin Consolidated cases
and JERRY C. PENDERGRASS, et al., Plaintiffs, v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, Defendant	Case No. 3:97-1176

AFFIDAVIT OF CLAUDIA BONNYMAN

The affiant, Claudia Bonnyman, having been duly sworn, makes oath as follows:

1. I am the Clerk and Master for the Chancery Courts of Davidson County.

2. I have been the Clerk and Master for nine (9) years.

3. Generally, when a petition for a writ of *certiorari* is filed, the petition, a proposed brief order ("fiat") and proposed writ of *certiorari* are placed before a Chancellor the same day

[Page 2]

the petition is filed. The short order ("fiat") directs the Clerk and Master to issue the writ of certiorari in the case.

4. When the signed order is returned to my office by the chancellor, the writ of *certiorari* is signed by the Clerk (or a deputy clerk) and it is issued usually within one hour of receipt of the court order.

5. Generally, our office processes all petitions for a writ of *certiorari* including presenting the proposed order and petition to a chancellor, docketing the signed order and issuing the writ of *certiorari* within two days of the filing of the petition.

6. I am over the age of 18 years and I am competent to testify as to the matters contained herein.

And further Affiant sayeth not.

/s/
Claudia Bonnyman

State of Tennessee)
County of Davidson)

Sworn to and subscribed before me this 4th day of November, 1998.

/s/ [Vicki J. Bailey]
NOTARY PUBLIC

My Commission Expires:
My Commission Expires JAN. 27, 2001

AGENDA

April 27, 1999

9:00 a.m.

METROPOLITAN ADULT ENTERTAINMENT BOARD
700 SECOND AVENUE SOUTH
HOWARD OFFICE BUILDING NASHVILLE

ELITE REPORTING SERVICES
ANGELA M. SYES, CCR
806 Porter Road
Nashville, Tennessee 37206
(615) 262-9592

* * *

* * *

Applications for adult entertainment licenses. Deja Vu of Nashville, 1214 Demonbreun Street.

MS. BORUM: Our recommendation is that it does not comply with health inspections. Some of the items on that health inspection report is: To clean the couches, rest room walls, fixtures, shower stall; repair commode; provide covered waste containers. Charles, in his inspection, noted a violation of the 3-foot rule.

MR. CHAIRMAN: All right.

MS. SCHAFFNER: I take it the fourth sheet back in the packet is the health inspection report?

MS. BORUM: That is correct.

MS. SCHAFFNER: And that inspection indicates that the couches need to be cleaned. Sanitation of the floors and the cubicles need to be improved. Covered waste containers need to be provided throughout the establishment. The commode in the dressing room needs to be repaired. The rest room walls and fixtures need to be cleaned. And the shower stall in the dressing room needs to be cleaned; is that right?

MS. BORUM: Yes, ma'am, that is correct.

MS. SCHAFFNER: Then . . .

MR. CHAIRMAN: Okay. So that it . . .

MS. SCHAFFNER: Then the inspector's report is the last sheet; is that right?

MS. BORUM: Yes, ma'am.

MS. SCHAFFNER: And the inspector's

finding upon inspection was that the dancers were in violation of the 3-foot rule; is that correct?

MS. BORUM: That is correct.

MS. SCHAFFNER: On the codes or building there was no findings since there were no booths; is that right?

MS. BORUM: Yes, ma'am, that is correct.

MS. SCHAFFNER: And as far as the police report, it was approved?

MS. BORUM: Yes, ma'am.

MS. SCHAFFNER: And the zoning was approved?

MS. BORUM: Yes, ma'am.

MS. SCHAFFNER: I move that we deny this application on the basis of the health inspection and the – this board's inspector's report.

MR. CHAIRMAN: It has been moved that we deny this report based on the – deny this application based on the inspector's report and this report from health.

Is there a second?

MS. STEVENS: Second.

MR. CHAIRMAN: Any discussions? All in favor signify by aye.

(All board members voted aye.)

* * *

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The next application is Pleasure Palace, 2407 Dickerson Pike.

Ms. Borum.

MS. BORUM: Our recommendation is that it does not comply with health codes. Some of these items were: Repair hand sink; clean walls and all air conditioning vents; clean storage areas; provide hand towels.

On your checklist sheet from Charles and myself, we received a late report yesterday afternoon from the building inspector who went out and made another inspection and approved the booth requirements.

MS. STEVENS: What does nonconforming mean?

MS. BORUM: Legally, "nonconforming" means that it was there prior to the funding. It's grandfathered in.

MS. SCHAFFNER: I take it that the building inspector's report disapproval since it . . .

MS. BORUM: It is marked disapproved on the checklist. I was handed the report about 5 until 4 yesterday afternoon.

MS. SCHAFFNER: Which disapproves or

approves?

MS. BORUM: That approves, as far as the building inspector.

MS. SCHAFFNER: So the only thing that's disapproved, then, is the health . . .

MS. BORUM: That is correct.

MS. SCHAFFNER: . . . report, which includes a need for repairing hand sink for the ease of cleaning; thoroughly cleaning the walls in booths and air conditioning vents in the hall; providing a minimum of 10-foot candles of illumination at the floor level in booths; cleaning up storage areas; eliminate all unnecessary items on

lower level; and provide hand towels in the bathrooms; is that correct?

MS. BORUM: Yes, ma'am.

MS. SCHAFFNER: I move that this application be denied on the basis of the health report.

MR. CHAIRMAN: It has been moved that this application be denied on the basis of the health report. Is there a second?

MS. STEVENS: Second.

MR. CHAIRMAN: Any discussion?

MR. BANKS: One question, Mr. Chairman. How will – how do they determine what the candle – how do they determine that?

MS. SCHAFFNER: I think it's a lighting machine, you know, that . . .

MR. BANKS: That they carry with them that determines the lighting?

MS. BORUM: It's measured from the feet.

MR. BANKS: That's all I have.

MR. CHAIRMAN: Okay. All in favor signify by aye.

(All board members voted aye)

MR. CHAIRMAN: Any nays?

Motion carries. This application is denied.

* * *

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MR. CHAIRMAN: The next is Club Platinum, 1711 Hayes Street.

MS. BORUM: We recommend disapproval. It does not comply with health code. Some of those items: Repair toilet; clean showers; eliminate storage that may attract rodents and insects.

MR. CHAIRMAN: Everything else is approved?

MS. BORUM: Yes, sir, everything else is approved.

MS. SCHAFFNER: So that includes repairing the toilet in the men's rest room, cleaning the floors along the lockers in the dressing room?

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MS. BORUM: That is correct.

MS. SCHAFFNER: Cleaning the showers in the dressing room, eliminating storage that may attract rodents and insects and cause – something.

MS. BORUM: Harborage.

MS. SCHAFFNER: What is harborage?

MR. CHARLES WATKINS: Places for rodents or insects to hide.

MS. SCHAFFNER: All right. I move this application be denied based upon the health inspection report.

MR. CHAIRMAN: Do we have a second?

MS. STEVENS: Second.

MR. CHAIRMAN: It has been moved and properly seconded that this application be denied based on the health inspector's report. All in favor say aye.

(All board members voted aye.)

MR. CHAIRMAN: Any nays? Application is denied.

* * *

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* * *

The next application is the Executive Club,

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701 4th Avenue South.

MS. BORUM: We recommend disapproval. It does not comply with health codes. Some of these items: Repair couch, clean rest room floors, provide covered trash cans.

MS. SCHAFFNER: I move this application be denied on the basis of the health violations.

MR. CHAIRMAN: Is there a second?

MR. STEVENS: Second.

MR. CHAIRMAN: It has been moved and properly seconded that this application be denied based on the health violations. All those in favor signify by – is there any discussion from the board? All in favor signify by aye.

(All board members voted aye.)

MR. CHAIRMAN: Any nays? This application is denied.

* * *

TN ST S 57-4-204

T. C. A. § 57-4-204

WEST'S TENNESSEE CODE ANNOTATED TITLE 57. INTOXICATING LIQUORS CHAPTER 4. CONSUMPTION OF ALCOHOLIC BEVERAGES ON PREMISES PART 2 – ADMINISTRATION, ENFORCEMENT, PROHIBITED ACTS

Current through End of 2001 First Reg Sess.

§ 57-4-204. Prohibited sexual conduct or representations

(a) In addition to the other duties imposed under this title, the commission is authorized to enforce the provisions of subsections (b), (c), and (d); and upon violation of such subsections by any person, firm or corporation licensed under the provisions of this chapter, the commission shall revoke the privilege license of such violator.

(b) The following acts or conduct on licensed premises are deemed contrary to public policy, and therefore no license shall be held at any premises where such conduct or acts are permitted:

(1) To employ, use or allow any person in the sale or service of alcoholic beverages or malt beverages in or upon the licensed premises while such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast below the top of the areola or of any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals;

(2) To employ, use or allow the services of any hostess or other person to mingle with the patrons while such hostess or other person is unclothed or in such

attire, costume or clothing as described in subdivision (b)(1);

(3) To encourage or permit any person on the licensed premises to touch, caress or fondle the breasts, buttocks, anus or genitals of any other person;

(4) To permit any employee or person to wear or use any device or covering, exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.

(c)(1) Conduct or acts on licensed premises in violation of this subsection are deemed contrary to public policy, and therefore no license shall be held at any premises where such conduct or acts are permitted.

(2) Live entertainment is permitted on any licensed premises, except that:

(A) No licensee shall permit any person to perform acts of or acts which simulate:

(i) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law;

(ii) The touching, caressing or fondling of the breast, buttocks, anus or genitals; or

(iii) The displaying of the pubic hair, anus, vulva or genitals.

(B) Subject to the provisions of subdivision (2)(A), any entertainer who is employed in whole or in part by the licensee to dance at such licensee's premises shall perform only upon a

stage at least eighteen inches (18") above the immediate floor level and removed at least six feet (6') from the nearest patron.

(3) No licensee shall permit any person to use artificial devices or inanimate objects to depict any of the prohibited activities described above.

(4) No licensee shall permit any person to remain in or upon the licensed premises who exposes to public view any portion of his genitals or anus.

(d) The following conduct or acts on licensed premises are deemed contrary to public policy, and therefore no license shall be held at any premises where such conduct or acts are permitted:

(1) The showing of film, still pictures, electronic reproduction, or other visual reproductions depicting:

(A) Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law;

(B) Any person being touched, caressed or fondled on the breast, buttocks, anus or genitals;

(C) Scenes wherein a person displays the vulva or the anus or the genitals; or

(D) Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above.

(e) Each county, city, or metropolitan government is empowered upon approval by a two-thirds (2/3) vote of its legislative body to authorize its law enforcement officers to conduct investigations into alleged violations of subsections (a)-(d), and such law enforcement officers shall report such violations to the commission for appropriate action by such commission.

(f) The commission shall be immune from liability resulting from conduct or acts of any law enforcement officers authorized to investigate violations of subsections (a)-(d) as provided in subsection (e).

1980 Pub.Acts, c. 904, §§ 1 to 3.

Metropolitan Code Section 7.24.030

Prohibited acts or conduct – Enforcement authority.

A. In addition to the other duties imposed by the metropolitan beer permit board by the Metropolitan Code of Laws, it shall be the duty of such board to enforce the provisions of this section and revoke or suspend the beer permit of any person, firm, corporation, syndicate or association, upon notice and hearing, for violation of the provisions of this section.

B. The following acts or conduct have been declared contrary to public policy by the General Assembly of the State of Tennessee when such activities take place upon premises licensed by the alcoholic beverage commission, pursuant to Tennessee Code Annotated Sections 57-4-101, et seq.; and the same are declared to be against the public

policy of the metropolitan government of Nashville and Davidson County, and therefore, no beer permit shall be held at any premises where such contract or acts are permitted:

1. To employ, use or allow any person in the sale or service of beer or like alcoholic beverages in or upon the premises of a permittee while such person is unclothed or in such attire, costume or clothing as to expose to view any portion of the female breast below the top of the areola or any portion of the pubic hair, anus, cleft of the buttocks, vulva or genitals;

2. To employ, use or allow the services of any hostess or other person to mingle with the patrons while such hostess or other person is unclothed or in such attire, costume or clothing as described in subdivision 1 of this subsection;

3. To encourage or permit any person on the premises of a permittee to touch, caress or fondle the breast, buttocks, anus or genitals of any other person;

4. To permit any employee or person to wear or use any device or covering, exposed to view, which simulates the breast, genitals, anus, pubic hair or any portion thereof.

C. Acts or conduct in premises licensed by the alcoholic beverage commission pursuant to Tennessee Code Annotated Sections 57-4-101, et seq. have been deemed contrary to public policy by the General Assembly of the state of Tennessee, and are declared against the public policy of the metropolitan government of Nashville and Davidson County; and, therefore, no beer permit shall be held at any premises where such conduct or acts are

permitted. Live entertainment is permitted on premises of a permittee except that:

1. No permittee shall permit any person to perform acts of or acts which simulate:

a. Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law;

b. The touching, caressing or fondling of the breast, buttocks, anus or genitals;

c. The displaying of the pubic hair, anus, vulva or genitals.

2. Subject to the provisions of subdivision 1 of this subsection, any entertainer who is employed in whole or in part by the permittee to dance at such permittee's premises shall perform only upon a stage at least eighteen inches above the immediate floor level and removed at least six feet from the nearest patron.

3. No permittee shall permit any person to use artificial devises or inanimate objects to depict any of the prohibited activities described above.

4. No permittee shall permit any person to remain in or upon the premises who exposes to public view any portion of his or her genitals or anus.

D. The following acts or conduct have been declared contrary to public policy by the General Assembly of the state of Tennessee when such activities take place upon premises licensed by the alcoholic beverage commission, pursuant to Tennessee Code Annotated Sections 57-4-101, et seq.; and the same are declared to be against the public policy of the metropolitan government

of Nashville and Davidson County; and, therefore, no beer permit shall be held at any premises where such conduct or acts are permitted:

1. The showing of film, still pictures, electronic reproduction, or other visual reproductions depicting:

a. Acts or simulated acts of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law;

b. Any person being touch [sic], caressed or fondled on the breast, buttocks, anus or genitals;

c. Scenes wherein a person displays the vulva or the anus or the genitals;

d. Scenes wherein artificial devices or inanimate objects are employed to depict, or drawings are employed to portray, any of the prohibited activities described above. (Ord. 90-1339 § 1(5-7), 1990; prior code § 5-1-34)

(Nashville 4-93)